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No. 87-1070

IN THE

Supreme Court of the United States

October Term, 1987

FOREIGN CREDIT INSURANCE ASSOCIATION,
Petitioner,

v.

NU-AIR MANUFACTURING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

HENRY A. HUBSCHMAN
(Counsel of Record)
ELLIOT E. POLEBAUM
ROBERT P. PARKER
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004-2505
(202) 639-7000

Attorneys for Petitioner

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. The Court of Appeals' Decision Conflicts With Other Circuit Court Decisions And Raises Important Concerns Regarding The Administration of Federal Programs	2
II. This Petition Presents The Important Question Whether Formation Of A Contract With A Federal Agency Is Governed By Federal Or State Law	4
CONCLUSION	6

TABLE OF AUTHORITIES

	PAGE
Anderson v. *Occidental Life Ins. Co.*, 727 F.2d 855 (9th Cir. 1984) *(per curiam)*	2,3
Beverly v. *Macy*, 702 F.2d 931 (11th Cir. 1983)	4,5
Brazil v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985)	4,5
Bushman v. *Seiler*, 755 F.2d 653 (8th Cir. 1985)	2,3
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	4
Lovell Mfg. v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985)	5
United States v. *Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986)	5
West v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979)	4
Westfall v. *Erwin*, 484 U.S. , 108 S. Ct. 580 (1988)	2

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INTRODUCTION

Respondent Nu-Air Manufacturing Company's ("Nu-Air") Brief in Opposition to the Petition for a Writ of Certiorari focuses on issues which were not material to the lower court's decision. Nu-Air addresses first the Eleventh Circuit's departure from a uniform body of law holding that authorized agents of the Federal Government are immune from common law tort claims. Nu-Air reasons that because its claims were filed with the Foreign Credit Insurance Association ("FCIA") under the commercial risk provisions of its policy (as to which FCIA was the nominal insurer), FCIA did not act as the agent of the Export-Import Bank of the United States ("Eximbank"), a Federal Government agency and the political risk insurer under the policy. The court of appeals, however, accepted the parties' stipulation and the district court's determination that FCIA acted at all material times in its capacity as Eximbank's agent in connection with the issuance of Nu-Air's policy. The court of appeals rejected FCIA's entitlement to immunity based solely on its view that neither the Federal Government nor its agents are entitled to

immunity when they engage in conduct that may have a commercial dimension, notwithstanding an express congressional mandate to establish and administer a federal insurance program in furtherance of important national policies. In this respect, the court of appeals' decision is in conflict with decisions in the Eighth and Ninth Circuits,[1] a fact which Nu-Air's Opposition does not address.

Addressing itself next to the issue whether state, rather than federal, law applies to this case, Nu-Air asserts that the insurance contract in this case does not implicate federal concerns, and state law therefore should apply, because Nu-Air's claim was directed to the policy's commercial risk insurer, FCIA, and not to Eximbank. However, the issue presented by the instant petition is whether the *formation* of an insurance contract to which the Federal Government is indisputably a party should be governed by state, rather than federal, law. By focusing on the law governing its claims, Nu-Air presupposes the formation of the contract when, in fact, formation itself is the relevant issue.[2]

ARGUMENT

I. The Court of Appeals' Decision Conflicts With Other Circuit Court Decisions And Raises Important Concerns Regarding The Administration of Federal Programs

In the Petition for Certiorari, FCIA demonstrated that the court of appeals' decision denying FCIA immunity directly contradicts the decisions of various courts of appeals which have held that authorized agents of the Federal Government, including corporate entities compensated by the Federal Government, are

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1. *See Bushman* v. *Seiler*, 755 F.2d 653 (8th Cir. 1985); *Anderson* v. *Occidental Life Ins. Co.*, 727 F.2d 855 (9th Cir. 1984) *(per curiam)*.

2. The recent decision in *Westfall* v. *Erwin*, 484 U.S. , 108 S.Ct. 580 (1988), has no bearing on this Petition, as FCIA's entitlement to immunity has never been challenged on the basis that FCIA's conduct was not discretionary in nature.

immune from all common-law tort suits (including suits sounding, as here, in negligent misrepresentation).[3] Nu-Air purports to distinguish those cases on the basis that FCIA's involvement in the Federal Government's export credit insurance program is in part for FCIA's own account. The court of appeals, however, did not rely on any such distinction.[4] The court of appeals instead artificially divided government enterprises that have a commercial dimension, like insurance programs, from other government enterprises. It further distinguished between those torts, like negligent misrepresentation, which may arise in a federal insurance program, and torts like defamation. Petition for Certiorari at 14a. No other court has ever drawn the distinctions adopted by the court of appeals, although the opportunities have been frequent. *See* Petition for Certiorari at 13-15.

Congress has authorized Eximbank to encourage American exports through the establishment of a federally administered export-credit insurance program. 12 U.S.C. § 635(a)(1). Congress further authorized Eximbank to administer that program, and has authorized other Federal Government agencies to administer similar programs, with the assistance of private insurers acting as the Federal Government's agents and intermediaries. 12 U.S.C. § 635(c)(2); Petition for Certiorari at 8 n.9. In one judicial stroke, the court of appeals in this case

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3. *See* Petition for Certiorari at 13-15 (citing cases in which courts have held (1) that private insurers and other contractors acting on behalf of the Federal Government are immune from suits sounding in non-constitutional torts, and (2) that immunity protection extends to the tort of negligent misrepresentation).

4. As the Eighth Circuit observed in *Bushman* v. *Seiler, supra,* the immunity issue requires a resolution of two questions: (1) whether the defendant was an agent of the government, and (2) whether the agent is entitled to immunity in the circumstances of the case. 755 F.2d at 655. Nu-Air, in its Opposition, contests FCIA's agency status. *See, e.g.,* Opposition at 9 (distinguishing other federal insurance cases on the basis, *inter alia,* of FCIA's relationship with Eximbank). The court of appeals, however, accepted FCIA's agency status, but held that FCIA was not entitled to immunity as an agent in a Federal Government insurance program, because its activity included a commercial dimension. Petition for Certiorari at 11a n.22.

has imposed a high price—unrestricted tort liability—on Congress' chosen vehicle for implementing such programs. The consequences of the court of appeals' sweeping declaration for the Federal Government's insurance programs warrant review of the court of appeals' judgment by this Court.

II. This Petition Presents The Important Question Whether Formation Of A Contract With A Federal Agency Is Governed By Federal Or State Law

The Petition presents the important quetion whether the formation of a contract between Nu-Air, FCIA and Eximbank should be governed by federal common law because a Federal Government agency, Eximbank, was a full party to the contract.[5] Nu-Air's Opposition treats an entirely different issue—the law which should govern a claim directed at FCIA after an insurance contract has already been formed.

The contract formation issue raised in this lawsuit is of critical import to the administration of the numerous federal·programs which involve contractual relationships among private and public entities. Eximbank and FCIA must know of the circumstances under which they obligate themselves to an insurance applicant. Similarly, the applicants for Eximbank and FCIA insurance, and other similar Federal Government-sponsored insurance, must be able to evaluate whether they have successfully secured insurance or must seek to protect their interests by some other means. Identically situated policyholders should be subject to uniform treatment under a Federal Government program. For these reasons, every court of appeals to consider the issue has concluded that federal common law, rather than the disparate laws of more than fifty jurisdictions, should apply to the determination of whether the parties to a federal insurance contract in fact have

5. *See*, e.g., *Beverly* v. *Macy*, 702 F.2d 931 (11th Cir. 1983); *Brazil* v. *Giuffrida*, 763 F.2d 1072 (9th Cir. 1985); *West* v. *Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979). *See also*, Petition for Certiorari at 20-22. These cases, which were cited in FCIA's brief to the court of appeals, are the progeny of this Court's decision in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), thus preserving FCIA's right to petition for a writ of certiorari on this issue.

formed such a contract.[6] Nu-Air's effort to distinguish these cases based on whether a claim filed by the insured is one covered by the policy's commercial risk coverage, rather than political risk coverage, is misplaced.[7]

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6. *See Brazil* v. *Giuffrida*, 763 F.2d 1072, 1075-76 (9th Cir. 1985) (federal law governs renewal of a federal insurance policy); *Beverly* v. *Macy*, 702 F.2d 931 (11th Cir. 1983) (federal law governs the determination of a party's rights under a purely private contract issued in connection with a federal insurance program, as federal rights were affected); *United States* v. *Parish of St. Bernard*, 756 F.2d 1116, 1121 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986) (federal common law governs formation of a contract under a federal insurance program).

7. Nu-Air places great reliance on the Third Circuit's decision in *Lovell Mfg.* v. *Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985). The Third Circuit in *Lovell* concerned itself with the issue of the parties' purported waiver of a condition subsequent to coverage under the policy; the Third Circuit in *Lovell* was not concerned with the issue whether the parties had consummated a contract which bound FCIA and Eximbank.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY A. HUBSCHMAN
(Counsel of Record)
ELLIOT E. POLEBAUM
ROBERT P. PARKER
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004-2505
(202) 639-7000

Attorneys for Petitioner

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